

STATE OF MICHIGAN IN THE  
SUPREME COURT

ROUGH WORLD, LLC and  
UPROOTED ELECTROLYSIS, LLC,

Plaintiffs- Appellees,

SC No. 162482

v

COA No. 355868

MICHIGAN DEPARTMENT OF CIVIL  
RIGHTS and DIRECTOR OF  
DEPARTMENT OF CIVILRIGHTS,

COC No. 20-000145-MZ

Defendants-Appellants.

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**BRIEF AMICUS CURIAE OF MICHIGAN ASSOCIATION OF JUSTICE**  
**\*CORRECTED\***

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Dated: December 17, 2021

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The MAJ is an organization of Michigan lawyers engaged primarily in trial litigation work. MAJ consists of member attorneys dedicated to advocating for the interest of the public and protecting the integrity of the judicial system. The MAJ recognizes an obligation to assist this Court on significant issues of law that would substantially affect the orderly administration of justice in trial courts of this state. Equal access to justice is a core belief of the organization and a matter integral to the determination under consideration here. In this matter, the MAJ supports Defendants-Appellants in urging this Court to hold that the ELCRA's prohibition on discrimination "because of . . . sex" protects individuals from discrimination based on their sexual orientation.

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<sup>1</sup> Pursuant to MCR 7.312(H)(4), Amicus states that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amicus or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

### QUESTIONS PRESENTED

1. Whether the prohibition on discrimination “because of...sex” in the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.* applies to discrimination based on sexual orientation?

Amicus’s answer: Yes.

Defendants-Appellants’ answer: Yes.

Plaintiffs-Appellees’ answer: No

## STATUTES INVOLVED

### **MCL 37.2102(1) provides:**

The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.

### **MCL 37.2301(a) provides in part:**

“Place of public accommodation” means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

### **MCL 37.2302(a) provides:**

Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color national origin, age, sex, or marital status.

## INTRODUCTION

Under the plain language of ELCRA, discrimination “because of ... sex” is prohibited. MCL 37.2102(1). Justice requires that the term “sex” not be artificially limited to exclude those individuals discriminated against based on sexual orientation; any other conclusion contravenes the language of the statute and the statute’s purpose which “is to prevent discrimination against persons based on their membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.” *Bryant v Automatic Data Processing, Inc.*, 151 Mich App 424 (1986); *Micu v Warren*, 147 Mich App 573 (1985). Eliminating sexual orientation sex discrimination from the protections of the ELCRA not only denies affected individuals equal access to basic civil rights, but also denies them access to our judicial system. To the contrary, the public interest is furthered *only* when individuals denied basic rights accorded by statute, can turn to our judicial system for relief. For these reasons, MAJ Amicus Curiae urges this Court to reverse the decision of the Court of Claims denying summary disposition to Defendants, and hold that the ELCRA’s prohibition on discrimination “because of . . . sex,” applies to discrimination based on sexual orientation, and in so doing directly overrule the contrary holding by Court of Appeals in *Barbour v Department of Social Services*, 198 Mich App 183 (1998).

## STATEMENT OF FACTS AND PROCEEDINGS AND STANDARD OF REVIEW

MAJ Amicus Curiae hereby relies upon the statement of facts and proceedings and the standard of review set forth by Appellants Michigan Department of Civil Rights and Director of the Michigan Department of Civil Rights in their Brief on Appeal.

## ARGUMENT

**ELCRA prohibits discrimination against an individual because of his or her sexual orientation under the prohibition against “discrimination because of... sex.” This conclusion eliminates contrived subcategories of “sex” not found in the statute and insures access to the courts for all those being discriminated against “because of... sex.”**

The purpose of ELCRA “is to prevent discrimination against persons based on their membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.” *Bryant v Automatic Data Processing, Inc.*, 151 Mich App 424 (1986); *Micu v Warren*, 147 Mich App 573 (1985). ELCRA is a remedial statute with the aim of protecting individuals who have been discriminated against as a result of the prejudices and biases borne against them because of their membership in a certain class. *Miller v CA Muer Corp*, 420 Mich 355 (1984).

As a remedial statute, ELCRA is to be interpreted to embrace the statute’s remedial purpose, “to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.” *Radke v Everett*, 442 Mich 368, 379 (1993) (citation omitted). Indeed, this Court has held that remedial statutes, like the ELCRA, are to be liberally construed to “suppress the evil and advance the remedy.” *Eide v Kelsey-Hayes*, 431 Mich 26, 34 (1988). Unfortunately, the Michigan Court of Appeals failed to follow these directives in *Barbour v Department of Social Services*, 198 Mich App 183, 186 (1998).

In *Barbour*, the Court denied the protection of the ELCRA to individuals discriminated against based on sexual orientation finding that “harassment based on ...sexual orientation” was not gender-based.<sup>2</sup> That holding by the Court of Appeals both repudiates the remedial intent of the Act and rejects the statutory language by effectively creating “subcategories” of discrimination based on “sex.” In so doing, *Barbour* paved the way for the arguments made by Plaintiffs in the

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<sup>2</sup> The court reached that conclusion largely by relying on now-overturned cases interpreting Title VII of the federal Civil Rights Act of 1964. See e.g., *DeSantis v Pac Tel & Tel Co*, 608 F2d 327, 329 (CA 9, 1979), quoting *Holloway v Arthur Andersen & Co*, 566 F2d 659 (CA 9, 1977).

instant case. For example, Rouch World asserted below that “there is no protection under the ELCRA for the categories of sexual orientation or gender identity.” (MSC App., p. 21a.) (emphasis added) Similarly, Uprooted Electrolysis asserted below that discrimination based on gender identity is not a protected category under the ELCRA as sex “is controlled necessarily by an individual’s chromosomal constitution.” (*Id.* at 45a, 47a, 54a.) (emphasis added). The concept of distinct “categories” of sex-based discrimination is not found in the statute<sup>3</sup> and was rejected by the U.S. Supreme Court in *Bostock v Clayton County, Georgia*, --- US ---, 140 S. Ct 1731, 207 L. Ed. 2d 218 (2020).

In *Bostock*, the U. S. Supreme Court held that the language of Title VII which prohibits discrimination “because of... sex,” prohibits discrimination based on gender identity and sexual orientation by its terms. *Id.* at 1737. Where the statutory language is the same,<sup>4</sup> this Court has

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<sup>3</sup> Some might argue that several sections of the Act do create subcategories in the context of sex discrimination, citing to MCL 37.2201(d), MCL 37.2202(1)(d) and MCL 37.2103(i). However, Sections 2201(d) and 2202(1)(d) were amended in direct response to federal court decisions that had limited the reach of comparable provisions within Title VII, and the amendment found in Section 2103(i) focused on the quality of the behavior that was prohibited by the law, not the individuals covered. In each case, the amendments expanded coverage. For example, in response to the U.S. Supreme Court’s decision in *General Electric v Gilbert*, 429 US 125 (1976), holding that pregnancy discrimination was not prohibited sex discrimination at that time under Title VII, Section MCL 37. 2201 was amended in 1978 to provide that “sex” “includes, ...pregnancy, childbirth, or a medical condition related to pregnancy or childbirth....”. Similarly, in response to the Sixth Circuit’s decision in *Reeves v Swift Transportation Co.* 446 F3d 637, 641-642 (CA 6, 2006), abrogated by *Young v United Parcel Serv*, 575 US 206 (2015), which had effectively denied protection to pregnant women who required work limitations, MCL 37.2202(1)(d) was amended in 2009 to assure that those women would be treated the same as any other employee in that circumstance. These definitions were designed to preemptively confirm the broad protections of ELCRA prohibiting sex discrimination, not to otherwise limit its reach.

Similarly, Section 37.2103(i), added in 1980, expanded the act by directing that “discrimination because of sex **includes** sexual harassment.” The Legislature targeted sexual harassment in the 1980 amendments, “because it is both ‘pervasive’ and ‘destructive, entailing unacceptable personal, organizational, and societal costs.’ House Legislative Second Analysis, HB 4407, August 15, 1980.” *Radtke v Everett*, 442 Mich 368, 380 (1993). This amendment clarified the *quality of the behaviors targeted* for remediation and again expanded coverage. It did not attempt to limit the individuals benefited by the Act.

<sup>4</sup> 42 USC 2000e-2(a)(1) makes it unlawful to “discriminate against any individual . . . because of . .

looked to federal decisions for guidance and should do so here. *Chambers Trettco, Inc.*, 463 Mich 297, 313 (2000) (Acknowledging that the court has been often “guided in [its] interpretation of the Michigan Civil Rights Act by federal court interpretations of its counterpart federal statute.”) This Court has further instructed that its “primary focus” in interpreting a statute “is the language of the statute under review,” and warns against “chang(ing) the words of a statute in order to reach a different result.” *People v Harris*, 499 Mich 332, 345 (2016).

Certainly, the statutory language of ELCRA does not recognize these purported subcategories of sex-based discrimination in its clear prohibition of “discrimination based on ...sex.” In other words, the ELCRA does not prohibit “discrimination based on .... sex,” “**except or excluding** discrimination as a result of sexual orientation or gender identity.” There is no exclusionary language in the ELCRA that would support such a limited reading, and the rules of statutory construction dictate against importing limiting effect into a remedial statute *Weakland v Toledo Eng’g Co.*, 467 Mich 344, 354 (2003).<sup>5</sup> Reading the statute *as written* requires inclusion of, and the protection of, individuals who are treated differently based on sex, including based upon their sexual orientation. *Bostock*, 140 S.Ct. at 1737.

The fallacy of employing these “subcategories” to limit those protected from discrimination “because of ...sex,” and the resulting inequity of doing so, becomes particularly apparent upon

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. sex.” The analogous language appears in each subpart of ELCRA. See MCL 37.2202(1)(a) providing that an employer “shall not . . . fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term or condition, or privilege of employment, because of . . . sex.” See MCL 37.2402(a) providing that an educational institution shall not “discriminate against an individual in the full utilization of or benefit from the institution . . . because of . . . sex.” Finally see MCL 37.2302(a) which prohibits a place of public accommodation from “deny[ing] an individual the full and equal enjoyment of the . . . accommodations because of . . . sex.”

<sup>5</sup> Where the Legislature wanted to limit the Act’s reach as to individuals protected, it did so directly. See Sections 37.2201(d) and 2202(1)(d) both of which exclude “nontherapeutic abortions not intended to save the life of the mother” from the pregnancy protections of the law. See also Section 37.2303 which precludes application of the sex (and other) discrimination protections to private clubs.

review of the decision of the Court of Claims here. Caught between *Barbour* and *Bostock*, the Court of Claims concluded that discrimination was prohibited **if** it arose as a result of gender identity, but **not** where it arose as a result of sexual orientation --- this despite the undeniable fact that the discrimination occurs in both of those situations when an individual of one gender is treated differently, and more adversely, than a member of the other gender for the same behavior. See *Bostock*, 140 S. Ct. at 1737 (“[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”) Moreover, discrimination based on sexual identity or sexual orientation is effectively discrimination premised on sexual stereotyping— i.e., treating an individual of one gender differently from an individual of another gender because they do not behave according to, or otherwise conform to, some societal expectation associated with the gender. This Court has already concluded that the purpose of the ELCRA is to protect against stereotyping based on the “characteristics of a class to which a person belongs.” *Miller v. CA Muer Corp*, 420 Mich 355, 362–63, (1984). That protection must be applied in the instant case to reject the contrary conclusion reached in *Barbour* and the Court of Claims below.

In *Bostock*, the U.S. Supreme Court determined that discrimination practiced based on sexual orientation was “discrimination based on... sex,” and we urge this Court to adopt the same result here<sup>6</sup>. Any other determination deprives victims of sex based discrimination their civil rights and, by extension, deprives them of access to the courts and when access is impaired, there is no justice. ELCRA prohibits discrimination “because of...sex” in “employment, housing and other real estate, and (in) the full and equal utilization of public accommodations, public service, and educational facilities...” MCL 37.2102(1). As set forth above, the ELCRA must be interpreted according to its clear language so as to broadly embrace the statute’s remedial purposes in providing

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<sup>6</sup> The Appellants and other amici have fully briefed the substantive legal rationales warranting the same. See also *Bostock*, 140 S. Ct. at 1741-1742

access to the courts for those who suffer discrimination. Since the Michigan Court of Appeals' decision in *Barbour*, Michiganders have been precluded from accessing the courts to remedy discrimination they encounter (whether in employment, in education, in housing, or in the use of public accommodations), simply because of a contrived categorization related to their sexual orientation. The Legislature's emphasis on a victim's right to access the courts to "suppress the evil and advance the remedy"<sup>7</sup> regarding discrimination, is underscored by the statute's provision for the recovery of attorney fees. MCL 37.2802. As the Court of Appeals explained, "(t)he purpose of the CRA's attorney fee provision is to encourage persons deprived of their civil rights to seek legal redress, to ensure victims of discrimination access to the courts, and to deter discrimination. (citations omitted; underlining added). *Grow v. W.A. Thomas Co.*, 236 Mich. App. 696, 720 (1999). Individuals discriminated against based on sexual orientation must not be denied access to the courts when the ELCRA provides protection in the plain language of the statute.

### CONCLUSION

Discrimination based on sexual orientation is discrimination based on sex. Eliminating sexual orientation from the protections of the ELCRA not only denies affected individuals equal access to basic civil rights, but also denies them access to our judicial system. The ELCRA is a remedial statute which should not be interpreted to exclude protection otherwise afforded by its very terms. Justice demands that individuals discriminated against based on sexual orientation enjoy the protections of the ELCRA.

For these reasons, the Michigan Association of Justice as Amicus Curiae respectfully requests that this Honorable Court reverse the Court of Claims denial of summary disposition to Defendants, and hold that the ELCRA's prohibition on discrimination "because of . . . sex," applies to discrimination based on sexual orientation, and in so doing directly overrule the contrary holding

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<sup>7</sup> *Eide v Kelsey-Hayes*, 431 Mich 26, 34 (1988).

by Court of Appeals decision in *Barbour v Department of Social Services*, 198 Mich App 183 (1998).

Respectfully Submitted:

Dated: 12/17/2021

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